No. 96-1669

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PADDOCK PUBLICATIONS, INC.,
Petitioner,
v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that Petitioner's failure to allege antitrust injury required dismissal of its complaint.

2. Whether the decision by the court of appeals is consistent with this Court's precedents and with the decisions of other circuits.

3. Whether the court of appeals correctly held that this Court's decision in *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953), is inapplicable to the facts of this case and, even if applied, would not have condemned the restraints challenged below.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 the parents and subsidiaries (except wholly owned subsidiaries) of the respondents are as follows:

The parent companies of the Los Angeles Times/ Washington Post News Service, Inc. are The Times Mirror Company (50%) and The Washington Post Company (50%). The parent company of the New York Times Syndication Sales Corporation is The New York Times Company. The parent company of Chicago Tribune Company and Tribune Media Services, Inc. is the Tribune Company. The parent company of the Chicago Sun-Times, Inc. is Hollinger International, Inc. United Media is a name under which United Feature Syndicate Inc. and the Newspaper Enterprise Association do business. The E. W. Scripps Company is the ultimate parent of United Feature Syndicate Inc. and the Newspaper Enterprise Association. The parent company of King Features Syndicate, Inc. is the Hearst Corporation. Respondents The Times Mirror Company d/b/a Los Angeles Times Syndicate and Creators Syndicate have no parent companies. None of the respondents has a subsidiary that is not wholly owned.

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT

Petitioner Paddock, Inc. ("Paddock") publishes the *Daily Herald,* a general interest newspaper serving the Chicago metropolitan area. (P. App. 96.)[1] Respondents are the publishers of two other Chicago daily newspapers (the *Tribune* and the *Sun-Times*), two suppliers of supple-

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[1] P. App. refers to the appendix filed with Paddock's petition.

mental news services[2] and five suppliers of syndicated features and comics.[3] Pursuant to contract, the news services, NYTNS and LAT/WP, provide their copyrighted materials to the *Tribune* and the *Sun-Times* respectively on an exclusive basis. Each of the newspapers also has individual contracts with each of the remaining respondents to publish syndicated features and comics on an exclusive basis in the Chicago area.[4]

Paddock alleged below that the licenses granted to the *Tribune* and *Sun-Times* by the supplemental-news-service and syndicator defendants (collectively referred to hereafter as the supplier defendants) restrain trade in violation of Sherman Act § 1 because the *Daily Herald* is thereby denied access to these materials. (P. App. 109-110). As a result of this "accumulation of rights by the *Tribune* and the *Sun-Times*," Paddock contended that the *Daily Herald* had been restrained in competing with the *Tribune* and the *Sun-Times* and in expanding its areas of circulation. (P. App. 111). While Paddock acknowledged the availability of supplemental news services and syndicated features not licensed to the *Tribune* or the *Sun-Times*, it contended that those services were all either "available to all newspapers on a non-exclusive basis" or were not sufficiently "popular" to serve as "reasonably effective substitutes." (P. App. 109-10).

The complaint did not allege horizontal collusion between any of the supplier defendants or between the

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[2] The New York Times News Service (NYTNS) and the Los Angeles Times/Washington Post News Service (LAT/WP).

[3] Tribune Media Services, Inc., Creators Syndicate, King Feature Syndicate, Inc., The Times Mirror Company d/b/a Los Angeles Times Syndicate, United Media and Universal Press Syndicate ("the syndicator defendants").

[4] The *Daily Herald* similarly contracts with various of the syndicator defendants and publishes features licensed by them. (Pet. 21 n.4; P. App. 105.)

Sun-Times and the *Tribune*. It also did not allege market or monopoly power with respect to any of the supplier defendants.

Respondents promptly filed a motion to dismiss the complaint. The Magistrate Judge subsequently issued a Report and Recommendation that the motion be granted, concluding that absent allegations of monopoly power or collusion among any of the defendants, Paddock's claim that the exclusive licenses collectively deny it access to material essential to its ability to compete did not state an antitrust violation. (P. App. 59-60.)

The District Court accepted the Magistrate Judge's recommendations and adopted his conclusion that Paddock's complaint did not state a claim under section 1 because it failed to allege a cognizable injury to competition, as the Rule of Reason requires. (P. App. 68-69.) The court rejected Paddock's argument that the individual effects of the challenged licenses could be aggregated to establish the necessary antitrust injury. (P. App. 72-83.)

The District Court granted Paddock leave to amend, and Paddock filed a second complaint. (P. App. 115.) Concluding that the amended complaint merely repackaged the allegations of the initial complaint and still depended on the theory that the effects of the individual licenses could be aggregated for purposes of stating an injury to competition, the District Court again dismissed Paddock's claims. (P. App. 91-92.)

Paddock appealed the dismissal to the Seventh Circuit. As required by Fed. R. Civ. P. 12(b)(6), the Court of Appeals assumed the facts alleged in the complaint to be true, but nevertheless concurred in the District Court's conclusion that Paddock had failed to state a claim under section 1. It determined that Paddock's allegations fundamentally constituted "an 'essential facilities' claim—but without any essential facility," noting that the com-

plaint conceded that there were multiple, competing facilities to which the *Daily Herald* was seeking access and that no potential for monopoly existed at either the upstream or downstream level of production. (P. App. 5.)

Aligning itself with other courts that have considered challenges to exclusive copyright licenses, the Seventh Circuit concluded that, far from harming competition in any relevant market, the contracts at issue serve pro-competitive purposes, such as ensuring consumer access to a greater diversity of news stories, opinions and features. (P. App. 6.) The Seventh Circuit also affirmed the District Court's holding that the licenses constitute a form of exclusive distributorship with different effects on competition than the arrangements in the exclusive dealing precedents on which Paddock relied. (P. App. 9.) It further concluded that the licenses would be upheld, in any event, since the shortness of their terms offers Paddock ample opportunity to compete for the licensed materials. (P. App. 11-12.)

In view of Paddock's failure to allege any injury to competition, as required as a threshold matter in all Rule of Reason cases, the Seventh Circuit upheld the District Court's dismissal of the complaint. (P. App. 12.)

On January 21, 1997, by a unanimous vote, the Court of Appeals denied Paddock's petition for a rehearing. (P. App. 13.)

ARGUMENT

I. BOTH THE SEVENTH CIRCUIT AND THE DISTRICT COURT BELOW PROPERLY APPLIED THE RULE OF REASON IN DISMISSING PADDOCK'S COMPLAINT

Paddock broadly claims that the Seventh Circuit has adopted a "per se rule of legality" for all vertical arrangements. (Pet. 6-7.) As the discussion below explains, however, Paddock's dramatic assertion has no basis in

fact. Its complaint was dismissed (and that dismissal upheld), as the Rule of Reason requires, simply because it failed to allege any cognizable anticompetitive effects from the exclusive licenses at issue. Contrary to Paddock's contentions, this outcome is entirely consistent with the decisions of this Court and those of the other federal circuits.

This Court has recognized that vertical restraints "allow[] manufacturer[s] to achieve certain efficiencies in the distribution of [their] products," that may benefit consumers through increased interbrand competition.[5] With respect to exclusive distributorships in particular, it has indicated that, absent a showing that alternative supplies are not available, a manufacturer's decision to sell its products to only one outlet in a region does not offend the antitrust laws.[6] Accordingly, lower courts applying the Rule of Reason in exclusive distributorship or analogous cases [7] have routinely required, as the Seventh Circuit

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[5] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977). Interbrand competition is "competition among the manufacturers [or suppliers] of the same generic product." Intrabrand competition is competition among distributors "of the product of a particular manufacturer [or supplier]." *Id.* at 52 n.19.

[6] *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967); *see also GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) ("[t]here is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant . . . an exclusive franchise"), *aff'd*, 433 U.S. 36 (1977).

[7] As the Seventh Circuit recognized, the individual licenses Paddock challenges are a form of exclusive distributorship, in which various suppliers have committed to provide their copyrighted materials to only one customer within a designated geographic area. (P. App. 9.) That finding is consistent with the way other courts have treated exclusive licenses of intellectual property in the context of a section 1 challenge. *Woodbury Daily Times Co. v. Los Angeles Time-Washington Post News Service*, 616 F. Supp. 502, 506 (D.N.J. 1985) (case also involving regional newspaper's section 1 challenge to larger paper's exclusive subscription to a supple-

did here, that the plaintiff allege and prove an injury to competition in the market as a whole (*i.e.*, to interbrand competition) in order to state a claim under section 1.[8]

The dismissal of Paddock's claim was based entirely upon its failure to meet this requirement, and not upon the application of any per se rule of legality for vertical restraints. According to Paddock, the source of antitrust injury in this case is its inability, by virtue of the exclusive licenses, to obtain access to the "best" syndicated news services and the "most popular" comics and features. (P. App. 123, 127-128, 133.) In an attempt to state an injury broader than merely the damage to its own competitive prospects, Paddock also alleged that the chal-

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mental news service; court determined that "[t]his case presents a situation of exclusive dealership" and examined restraint's effect on interbrand competition), *aff'd mem.*, 791 F.2d 924 (3d Cir. 1986); *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 309 F. Supp. 1301, 1307 (S.D.N.Y. 1970) (characterizing Tribune's exclusive license to syndicated features as an "exclusive dealership"). *See also* VIII Phillip E. Areeda, *Antitrust Law*, ¶¶ 1655a, 1655b at 606-07 (1989) (likening agreements that provide that a movie will be "exhibited in only one place at a time within a local market" or that "comic strips and syndicated columns [will be] printed in only one local newspaper" to "a manufacturer['s] appoint[ment of]a single dealer for a local market or even for the entire distribution of his product").

[8] *See* 1 Theodore L. Banks, *Distribution Law: Antitrust Principles and Practice* § 4.7.3 at 782-83 (1993) ("[s]ince *Sylvania*, the test of the legality of an exclusive distribution arrangement . . . has been the impact on interbrand competition": "[t]he mere fact that one dealer does not have the opportunity to purchase a product due to the presence of an exclusive arrangement does not state a situation of antitrust injury") (citing *Great Escape, Inc. v. Union City Body, Inc.*, 791 F.2d 532 (7th Cir. 1986)); *accord Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 392 (S.D.N.Y. 1993).

lenged restraints harm consumers by denying them the choice of alternative outlets in which to read the same stories and features that now appear only in the *Tribune* and the *Sun Times.* (P. App. 135.) But such allegations do not describe the kind of harm to competition that the antitrust laws were designed to prevent.

As the Seventh Circuit properly recognized, Paddock's theory of antitrust injury "is fundamentally an 'essential facilities' claim—but without an essential facility."[9] The sine qua non of such a claim is a single bottleneck facility that cannot reasonably or practically be duplicated by the plaintiff and which creates the potential for the monopoly in the supply market to be extended downstream.[10] However, Paddock's allegations on their face reveal that in this case competition exists at both levels of production (*i.e.*, among suppliers of copyrighted materials and among newspapers) and that there are at least three rival "facilities" for each type of material (*i.e.*, supplemental news services and features) that Paddock asserts is "vital" to its ability to compete.[11] As the Seventh Circuit rightly determined, those facts effectively preclude a finding of an essential facility here and eliminate any basis for inferring that the multiple exclusive licenses at issue have caused injury to anyone other than Paddock.[12]

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[9] P. App. 5. *See also* Paddock's Amended Complaint, P. App. 124 (alleging that "[a]ccess to at least one of [the defendant supplemental news] services is essential to enable the *Daily Herald* . . . to compete effectively with the *Tribune* and the *Sun-Time* in the sale of general interest newspapers in the Chicago Area Market").

[10] *See* P. App. 5 (distinguishing the facts here from those in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912)).

[11] P. App. 5 (observing that "[t]here are three supplemental news services that the *Herald* is willing to acknowledge as major competitors (and others besides, though the *Herald* denigrates them)" and "hundreds, if not thousands of opinion and entertainment features").

[12] P. App. 5 (citing *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024 (7th Cir.), *cert. denied*, 488 U.S. 909

Moreover, with respect to the licenses' impact on interbrand competition, which this Court has emphasized "is the primary concern of antitrust law," [13] the Seventh Circuit was able to discern only procompetitive effects. First, contrary to Paddock's assertion that the licenses "provide no benefits to consumers" (Pet. 3), the Court pointed out that by helping Chicago dailies to differentiate themselves, exclusive stories stimulate greater internewspaper competition and ensure that readers will be offered a wider selection of articles and features.[14] Second, it noted that by permitting intellectual property owners to maximize the value of their products, exclusive licensing arrangements create incentives for writers and artists to produce more copyrighted material. (P. App. 6.)

Finally, far from declaring all vertical restraints to be per se legal, the Seventh Circuit observed that the supplier defendants' practices could harm consumers if they facilitated "tacit collusion." [15] However, the Court noted that in this case the extremely unconcentrated nature of the

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(1988)). In *Flip Side*, the plaintiff concert promoter alleged that two of its competitors (JAM and Tempo) had violated section 1 by entering into an exclusive agreement to present concerts at a particular facility for which it alleged the only adequate substitute was unavailable as a result of an exclusive agreement with a third party. Flip Side contended that its inability to obtain rights to any comparable desirable facility established the necessary anticompetitive harm. The Seventh Circuit affirmed the district court's ruling for the defendants, concluding that "absent collusion between JAM and Tempo, . . . Flip Side had failed to demonstrate an antitrust injury." *Id.* 1034.

[13] *Sylvania*, 433 U.S. at 52 n.19; *see also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 724 (1988).

[14] P. App. 6 (noting that "[a] market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one.")

[15] P. App. 6 ("[t]acit collusion (economists' term for 'shared monopoly') could be a source of monopoly profits and injury to consumers even if none of the stages of production is monopolized").

supply market made such a danger remote and added that, in any event, Paddock had not alleged that the exclusive licenses had caused this sort of injury. (P. App. 7.)

In view of these findings, the Seventh Circuit affirmed the district court's decision dismissing the complaint. Given Paddock's failure to allege a cognizable anticompetitive effect from the licenses, the District Court and the Seventh Circuit were not obliged to inquire further into the "reasonableness" of the challenged restraints.[16] Paddock's loss of opportunity to try its claims on the merits is due simply to its own failure to make the threshold showing of antitrust injury required in all non-per se cases, and not to any jettisoning of the Rule of Reason by the Seventh Circuit.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE DECISIONS OF OTHER CIRCUITS

Having asserted the fallacy that the Seventh Circuit adopted a per se rule of legality for all vertical restraints, Paddock argues that this Court should grant certiorari to address the conflict that purportedly has now been created with its decisions and with the decisions of other circuits. As explained above, that argument is specious, since the Seventh Circuit made no such ruling. On the contrary, the Seventh Circuit's decision is entirely consistent with the antitrust principles applied by this Court and courts in other federal circuits to non-price vertical arrangements like the exclusive licenses at issue here.

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[16] *See Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1087 (7th Cir. 1992) (explaining that "[s]ince the district judge's decision was based on [the plaintiff's] failure to allege an anticompetitive effect on an identifiable market, the argument that the court improperly determined that the [challenged restraints] were reasonable on a motion to dismiss is without merit"), *cert. denied*, 508 U.S. 908 (1993).

As this Court has repeatedly emphasized, the antitrust laws are designed to protect competition, not competitors.[17] Any plaintiff asserting a Rule of Reason violation is required as a threshold matter to allege an injury to competition in the market generally, rather than simply to itself. This requirement is particularly important in the case of non-price vertical restraints, because of what this Court has recognized is their "real potential to stimulate interbrand competition."[18] Paddock's allegation that the exclusive licenses deprived it of access to the best news services and most popular comics failed to describe the requisite injury to consumer welfare. The Seventh Circuit thus properly held that Paddock was not entitled to proceed with its case.

Numerous other courts faced with claims analogous to Paddock's have come to the same conclusion, although no such citations appear in the petition for certiorari.[19]

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[17] *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

[18] *See Business Elec.*, 485 U.S. at 724 (citing *Sylvania*, 433 U.S. at 52 n.19).

[19] *See, e.g., Futurevision Cable Sys. of Wiggins v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 770 (S.W. Miss. 1992) (granting motion to dismiss challenge to exclusive arrangement between program provider and cable operator; it was apparent from the face of the complaint that the plaintiff had found alternative, though less popular, sources of programming and that the exclusive licenses had enhanced, rather than harmed interbrand competition), *aff'd mem.*, 986 F.2d 1418 (5th Cir. 1993). *See also TV Communications Network, Inc. v. Turner Network Television*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Theee Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1400 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 766 F.2d 1216 (10th Cir. 1986), *cert. denied*, 496 U.S. 1005 (1988); *Ralph C. Wilson Indus., Inc. v. Chronicle Broadcasting Cos.*, 794 F.2d 1359 (9th Cir. 1987); *Satellite Television*

Paddock particularly avoids the one federal case that considered exclusive licenses of copyrighted material identical to those at issue here and similarly held that the exclusivity promoted, rather than harmed, interbrand competition by forcing competing newspapers to contract with different suppliers, thus "guarantee[ing] that the reading public has access to a wider variety of news reporting and opinions." [20] There too the plaintiff alleged that because the defendant's news service was "unique," the exclusive subscription was anticompetitive. But the court rejected that argument, in view of the fact that other sources of news stories were plainly available.[21] Moreover, in response to the plaintiff's contention (reminiscent of Paddock's here) that the exclusive arrangement harmed consumers by preventing them from reading the same stories in more than one newspaper, the court explained that the effect described was merely a restriction on intrabrand competition that was more than outweighed by the li-

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714 F.2d 351; *Soffer v. National Amusements, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,286 (D. Conn. 1996); *Northeastern Educ. Television of Ohio, Inc. v. Educ. Television Assoc. of Metro. Cleveland*, 758 F. Supp. 1568 (N.D. Ohio 1990); *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D. Cal. 1979), *aff'd mem.*, 649 F.2d 866 (9th Cir. 1981); Areeda, *supra* note 7, ¶ 1653a at 578 (1989) (reviewing lower court cases applying the rule of reason to exclusive distribution agreements and noting that "[i]llegality has seldom been found, and judgment has frequently been given for the manufacturer at the pleading or summary judgment stage").

[20] *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Serv.*, 616 F. Supp. 502, 511 (D. N.J. 1985), *aff'd mem.*, 791 F.2d 924 (3d Cir. 1986). In *Woodbury*, a local New Jersey newspaper challenged the exclusive license held by the *Philadelphia Inquirer* to the one of the two supplemental news services that is also a defendant in this case.

[21] *See id.* (observing that "the [plaintiff] is free to write its own articles on the same subjects or, as a less costly alternative, to contract with [the] other supplemental news services which do exist").

censes' manifest stimulus to interbrand competition.[22] Accordingly, having expressly applied the Rule of Reason,[23] the court ruled that the plaintiff was not entitled to a further hearing of its claims on the merits, a result that is fully consistent with the Seventh Circuit's decision in this case and plainly does not reflect the adoption of a per se rule of legality for all vertical restraints.

Paddock's sole basis for claiming that the Court of Appeals' decision creates a conflict with other federal circuits is a sentence in a Third Circuit opinion[24] which sets forth the unremarkable proposition that "[w]hether a business arrangement unreasonably restrains trade is to be determined by the courts, on a case-by-case basis, using a rule of reason. . . ."[25] But in *Orson*, as here, the Third Circuit affirmed the district court's conclusion, without evidentiary hearing, that although the exclusive arrangements at issue "reduced intrabrand competition to some degree," (i.e., by preventing the plaintiff-movie theater from showing any first-run films its competitor had licensed), "they undeniably promoted interbrand competition by requiring [the plaintiff] to seek out and exhibit the films of other distributors."[26] Moreover, as was the case below, the court explained that "the indisputable existence of alternative sources of supply for the plaintiff

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[22] *Id.*

[23] *Id.* at 506 (observing that "[i]n judging concerted action on vertical nonprice restraints, the rule of reason standard applies").

[24] *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996).

[25] P. App. 8 (quoting *Orson*, 79 F.3d at 1367).

[26] *Orson*, 79 F.3d at 1399. *See also Northeastern Educ. Television*, 758 F. Supp. at 1477-78 (concluding that exclusive agreement between programming supplier and television station had increased interbrand competition by forcing other stations to go to alternative suppliers and that "[f]rom the television viewer's perspective, it is equally clear that the [exclusive license] increases the diversity of programming available to the viewing public").

negates the existence of anticompetitive effects in this case." [27] Because it was apparent from the record that the plaintiff had been able to obtain films from other distributors for its theaters—even if they were not its first choices—the court concluded that the exclusivity "did not produce the anticompetitive effects the Sherman Act was designed to prevent." [28]

Thus, contrary to Paddock's assertions, *Orson* actually *supports* the Seventh Circuit's opinion in this case. As both courts properly recognized, so long as alternative supplies exist, even if they are less attractive than materials made unavailable through an exclusive license, the antitrust laws do not provide a remedy to secure whatever resources a plaintiff may claim to be required for "effective competition."

The Seventh Circuit's opinion is fully consistent both with this Court's previous decisions in vertical restraint cases and with the decisions of courts in other circuits considering the legality of exclusive licenses. There is no conflict here.

III. THIS COURT'S DECISION IN *MOTION PICTURE ADVERTISING* IS INAPPLICABLE TO THE FACTS OF THIS CASE

Perhaps recognizing the frailty of its first two arguments, Paddock attempts to attract this Court's notice by presenting a third ground for review: *viz.* that "[i]n defending its new per se rule the Seventh Circuit rejected this Court's decision in *Motion Picture Advertising*" and

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[27] *Orson*, 79 F.3d at 1372.

[28] *Id.* at 1372 (observing that "the touchstone" of a rule of reason analysis is the challenged practice's "competitive effects"); *see also Ralph C. Wilson*, 794 F.2d at 1363 ("[b]efore we need to determine whether the [executive licenses] challenged by appellant are unreasonable restraints of trade, the appellant must show that [the licenses] injured or decreased competition").

described that opinion as "a derelict." (Pet. 10.) Paddock misstates not only the Seventh Circuit's language but also its holding. Far from rejecting this Court's analysis in *Motion Picture Advertsing,* the Seventh Circuit merely affirmed the district court's finding that that decision does not apply to the facts of this case, and went on to determine that even if it did, the exclusive licenses at issue here would be upheld.

Paddock's principal argument on appeal was that the district court erred by not applying this Court's analysis in exclusive dealing cases to its allegations concerning the exclusive licenses held by the *Tribune* and the *Sun-Times.* According to Paddock, under the case law applicable to such arrangements—in particular, this Court's opinion in *Motion Picture Advertising*—the aggregate effects of the *Tribune*'s and *Sun-Times*' exclusive licenses can constitute the antitrust injury necessary to make out a violation under section 1.

The Seventh Circuit correctly rejected this argument. At the outset, it noted that the quantitative foreclosure of *Motion Picture Advertising*—which depends upon the percentage of sales "foreclosed" to competitors "without proof of injury to consumers—reflects a bygone day in antitrust analysis." [29] Nevertheless, contrary to Paddock's charac-

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[29] In *Standard Oil Co. v. United States,* 337 U.S. 293 (1949) this Court adopted an approach for determining whether the foreclosure of a market by an exclusive dealing arrangement was "substantial," and therefore illegal, that focused almost entirely on the percentage of the market tied up as a result of the arrangement. Richard M. Steuer, *Exclusive Dealing in Distribution,* 69 Cornell L.Rev. 101, 106 (1983). It came to be known as the "quantitative substantiality" test. *Id.* However, in *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 329 (1961), this Court indicated that the appropriate focus in such cases was rather on "the probable effect of the contract on the relevant area of effective competition." Since then, lower courts have utilized an approach in which the percentage of the outlets foreclosed is but one of a number of factors considered in determining whether an exclusive dealing contract unrea-

terization of the opinion, the Seventh Circuit concluded that the district court "properly *did not rely* . . . on a belief that [*Motion Picture Advertising*] is a derelict," but rather held for three reasons that that case "is not controlling even if it remains authoritative." (P. App. 8.)

First, *Motion Picture Advertising* was decided under § 5 of the FTC Act which, as this Court noted, grants the Federal Trade Commission authority to forbid practices that endanger effective competition, even if they do not violate the Sherman Act.[30] While the Seventh Circuit acknowledged this Court's observation in that case that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act," it determined that the statement was dictum and noted, correctly, that "[n]o subsequent case has read *Motion Picture Advertising*[] to abolish the requirement of concerted action under § 1 of the Sherman Act."[31] Paddock has supplied no citations to the contrary.

Second, *Motion Picture Advertising* addressed exclusive dealing practices, while this case involves exclusive distributorships. (P. App. 9.) Exclusive dealing contracts obligate a firm to purchase all its inputs from a single source—just as the theaters in that case were committed to one distributor for all their advertising films.[32] As the

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sonably restrains trade. *See Barr Lab., Inc. v. Abbott Lab.*, 978 F.2d 98, 111 (3d Cir. 1992); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984).

[30] *See* 344 U.S. at 394 ("[t]he 'unfair methods of competition,' which are condemned by § 5(a) of the Act are not confined to those that were illegal at common law or that were condemned by the Sherman Act.")

[31] P. App. 9 (quoting 344 U.S. at 395).

[32] P. App. 9. *See also* Steuer, *supra* note 29, at 102 (exclusive dealing "is a vertical restriction that a supplier imposes on a cus-

Seventh Circuit pointed out, these kinds of arrangements properly raise concerns about foreclosure because, if they are widespread, they may preclude a new supplier from obtaining outlets for its products.[33]

By contrast, the Court explained, exclusive distributorships—the kinds of contracts at issue here[34]—"do[] not restrict entry at either [the supply or distribution] level." (P. App. 10.) Neither the *Tribune* nor the *Sun-Times* has committed to purchase all its news or features from a single source—so a new entrant in the supply of these materials is not foreclosed from selling to either of them. Accordingly, the Court rightly concluded that " '[f]oreclosure' of the kind about which *Motion Picture Advertising* was concerned does not occur under exclusive distribution contracts."[35]

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tomer, forbidding the customer from purchasing some category of products from any other supplier").

[33] P. App. 9. *See also* Stanley L. Ornstein, *Exclusive Dealing and Antitrust*, 34 Antitrust Bull. 65, 85 (1989) ("the threat from exclusive dealing is . . . in foreclosing the retail market to incumbent manufacturers, laying the foundation for manufacturer collusion or a dominant firm monopoly"); *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1293 (4th Cir.) ("what has concerned the courts about exclusive dealing arrangements is the possibility that a single manufacturer will control all or a substantial number of the available retail outlets"), *cert. denied*, 484 U.S. 827 (1987).

[34] Paddock attempts to distinguish this holding by arguing (for the first time) that "the exclusive licenses involved in this case are not distributorships but exclusive supply contracts." Pet. 11 n.3. However, as discussed above, the licenses granted to the *Sun-Times* and the *Tribune* contain no commitment by either paper to obtain its supplier of news or features exclusively from one source. Moreover, as explained in the preceding section, other courts considering exclusive licenses of copyrighted material like those at issue here have consistently viewed them as a form of exclusive distributorship. *See* note 7 *supra*.

[35] P. App. 10. *See also* Areeda, *supra* note 7, ¶ 1600 at 6 & n.10 (explaining with respect to a supplier's decision to make a dealer

Finally, far from "refusing to follow" this Court's decision in *Motion Picture Advertising*, the Seventh Circuit concluded that even if that opinion were applicable to the facts of this case, the exclusive licenses would be lawful because their terms are of short duration. It pointed out that both the FTC and this Court determined that "even exclusive dealing contracts are lawful if limited to [terms of] a year[]," in apparent recognition of the fact that "exclusivity can promote competition by making it feasible for firms to invest in promoting their products," and that "with one-year contracts, the entire market is up for grabs."[36] The Court then noted that "[t]hings work similarly in the newspaper business": "[c]ontract terms are short, so competition for the contract can flourish." (P. App. 10.) In the interim, exclusive licenses serve the procompetitive purposes of helping the subscribing paper "distinguish itself from, and compete with, its rivals" and of protecting its investment in the licensed material: "[t]he *Sun-Times* will not promote a readership for a particular columnist if the *Tribune* and the *Herald* carry the same column" because free-riding would dilute the value of its efforts. (P. App. 11.)

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his "sole outlet" or "exclusive distributor" in a designated area, "that this exclusiveness differs from that which makes a particular manufacturer a dealer's sole supplier," and emphasizing that "[a]lthough a sole outlet agreement necessarily deprives other would-be dealers of access to a supply of that manufacturer's brand, it does not ordinarily raise the concerns associated with preempting suppliers"); Steuer, *supra* note 29, at 114 ("[a] proper analysis of exclusive dealing must use a different approach from that used in analyzing [. . . other vertical restraints], because exclusive dealing creates significantly different procompetitive and anticompetitive effects"); *Satellite Television*, 714 F.2d at 355 (distinguishing between exclusive distributorship or territory provisions "and [e]xclusive requirement [or dealing] contracts" and noting that in the main the former "have been sanctioned because the effected increase in interbrand competition has outweighed the decrease in intraband competition").

[36] P. App. 10 (citing *Motion Picture Advertising*, 344 U.S. at 395-96).

Paddock protests that the exclusive licenses it challenges do not in fact end at the expiration of their terms, but are continually renewed. However, as the Seventh Circuit rightly pointed out, the FTC decision upheld by this Court in *Motion Picture Advertising* "did not insist that dealings between a distributor and a theater *cease* after a year; the parties were free to renew their arrangement for successive years; it was enough that there be an option to change distributors or renegotiate once a year." [37] Indeed the Court observed, "for all we can tell renewal was (and remains) the norm in the motion picture business." [38] In view of their short terms, the licenses clearly afforded Paddock all that *Motion Picture Advertising* requires: *i.e.*, the opportunity to "try to outbid the *Tribune* and the *Sun-Times* in the marketplace." [39]

Thus, notwithstanding Paddock's use of misquoted language to suggest the contrary, the Seventh Circuit did not ignore this Court's decision in *Motion Picture Advertising*. Rather, it affirmed the District Court's conclusion that the analysis in that case was inapplicable here to the exclusive licenses held by the *Tribune* and the *Sun-Times* and, even if applied, would not have resulted in their condemnation.[40]

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[37] *Id.; see also* P. App. 12 ("[t]he FTC and the Supreme Court . . . wanted to ensure that dealings continued only while they remained in the interests of both distributors and theaters—which meant that someone else could come along with a better deal and get the business").

[38] P. App. 11 (observing further that "[a]s long as arrangements serve the interests of both parties, they will continue, whether that means signing another in a series of one-year contracts or declining to exercise an annual option to cancel a contract").

[39] P. App. 12.

[40] Paddock's last argument is that "the Seventh Circuit ignored the allegations of Paddock's complaints and relied on factual presuppositions unsupported by the record." (Pet. 14.) On the contrary, the Court carefully considered Paddock's allegations in light

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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of the applicable precedents and determined that dismissal was appropriate because Paddock had failed adequately to allege the requisite antitrust injury. In any event, Paddock's arguments relate solely to factual issues in the court below, which do not warrant this Court's review. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

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